

**UNITED STATES BANKRUPTCY COURT**  
Eastern District of California

**Honorable Ronald H. Sargis**  
**Chief Bankruptcy Judge**  
**Sacramento, California**

**February 10, 2022 at 10:00 a.m.**

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1.	<a href="#"><u>21-21424</u></a> -E-7 <b>ROBERT MOHR</b> <a href="#"><u>21-2073</u></a> <b>BHS-1</b> <b>HUSTED V. MOHR, JR.</b>	<b>CONTINUED MOTION FOR ENTRY OF DEFAULT JUDGMENT</b> <b>12-3-21 <a href="#"><u>[15]</u></a></b>
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**Tentative Ruling:** Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court’s resolution of the matter.

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Local Rule 9014-1(f)(1) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Defendant and Office of the United States Trustee on December 3, 2021. By the court’s calculation, 34 days’ notice was provided. 28 days’ notice is required.

The Motion for Entry of Default Judgment has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 4004(a). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party’s failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

<b>The Motion for Entry of Default Judgment is <u>granted</u>.</b>
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Kimberly J. Husted, Chapter 7 Trustee (“Plaintiff-Trustee”) filed the instant Motion for Default Judgment on December 3, 2021. Dckt. 15. Plaintiff-Trustee seeks an entry of default judgment against Richard Brendan Mohr, Jr. (“Defendant”) in the instant Adversary Proceeding No. 21-2073-E.

The instant Adversary Proceeding was commenced on October 14, 2021. Dckt. 1. The summons was issued by the Clerk of the United States Bankruptcy Court on October 14, 2021. Dckt. 3.

The complaint and summons were properly served on Defendant. Dckt. 6.

Defendant failed to file a timely answer or response or request for an extension of time. Default was entered against Defendant pursuant to Federal Rule of Bankruptcy Procedure 7055 by the Clerk of the United States Bankruptcy Court on November 22, 2021. Dckt. 14.

## REVIEW OF COMPLAINT

Plaintiff-Trustee filed a complaint against Defendant praying for entry of judgment in the amount of \$23,700.00. The Complaint contains the following general allegations as summarized by the court:

- A. Defendant is the father of Debtor, Robert Brendan Mohr (“Debtor”).
- B. Debtor filed a Chapter 13 case on April 19, 2021, which was later converted to a Chapter 7 liquidation case on May 17, 2021.
- C. Plaintiff-Trustee was appointed as the Chapter 7 Trustee to administer Debtor’s Chapter 7 bankruptcy estate on May 18, 2021.
- D. On or about April 19, 2020 through April 19, 2021, Debtor paid to Defendant at least \$23,700.00 on an antecedent debt.
- E. Under 11 U.S.C. § 547(b), the transfer is a transfer of an interest of the Debtor occurring within 1 year of the filing of debtor’s bankruptcy while Debtor was insolvent.

## Prayer for Relief

Plaintiff-Trustee prays for an entry of judgment to consider the payments made between April 19, 2020 through April 19, 2021 as preferential. Plaintiff-Trustee requests that judgment be entered against Defendant in the amount of \$23,700.00.

## APPLICABLE LAW

Federal Rule of Civil Procedure 55 and Federal Rule of Bankruptcy Procedure 7055 govern default judgments. *Cashco Fin. Servs. v. McGee (In re McGee)*, 359 B.R. 764, 770 (B.A.P. 9th Cir. 2006). Obtaining a default judgment is a two-step process which requires: (1) entry of the defendant’s default, and (2) entry of a default judgment. *Id.*

Even when a party has defaulted and all requirements for a default judgment are satisfied, a claimant is not entitled to a default judgment as a matter of right. 10 MOORE’S FEDERAL PRACTICE—CIVIL ¶ 55.31 (Daniel R. Coquillette & Gregory P. Joseph eds. 3d ed.). Entry of a default judgment is within the discretion of the court. *Eitel v. McCool*, 782 F.2d 1470, 1471 (9th Cir. 1986). Default judgments are not favored, because the judicial process prefers determining cases on their merits whenever reasonably possible. *Id.* at 1472. Factors that the court may consider in exercising its discretion include:

- (1) the possibility of prejudice to the plaintiff,
- (2) the merits of plaintiff's substantive claim,
- (3) the sufficiency of the complaint,
- (4) the sum of money at stake in the action,
- (5) the possibility of a dispute concerning material facts,
- (6) whether the default was due to excusable neglect, and
- (7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits.

*Id.* at 1471–72 (citing 6 MOORE'S FEDERAL PRACTICE—CIVIL ¶ 55-05[s], at 55-24 to 55-26 (Daniel R. Coquillette & Gregory P. Joseph eds. 3d ed.)); *Kubick v. FDIC (In re Kubick)*, 171 B.R. 658, 661–62 (B.A.P. 9th Cir. 1994).

In fact, before entering a default judgment the court has an independent duty to determine the sufficiency of Plaintiff-Trustee's claim. *Id.* at 662. Entry of a default establishes well-pleaded allegations as admitted, but factual allegations that are unsupported by exhibits are not well pled and cannot support a claim. *In re McGee*, 359 B.R. at 774. Thus, a court may refuse to enter default judgment if Plaintiff-Trustee did not offer evidence in support of the allegations. *See id.* at 775.

## DISCUSSION

### Preferential Transfers under 11 U.S.C. § 547(b)

11 U.S.C. § 547(b) governs a Trustee's ability to recover payments made within the year prior to a bankruptcy filing. To establish a preference action, the following elements must be met: (1) a transfer of debtor's property to or for the benefit of a creditor; (2) for an antecedent debt owed by the debtor; (3) made while debtor was insolvent; (4) made either within 90 days before the date of filing the petition or within one year if such creditor was an insider; and (5) enables creditor to receive more than they would if (A) the case were under Chapter 7; (B) the transfer had not been made; and (C) creditor received payment of such debt to the extent provided by the provisions of this title. 11 U.S.C. § 547(b).

An "insider" for purposes of 11 U.S.C. § 547(b) is defined under 11 U.S.C. § 101(31). If the debtor is an individual, as Debtor is here, an insider is either (i) a relative of the debtor or of a general partner of the debtor; (ii) partnership in which the debtor is a general partner; (iii) general partner of the debtor; or (iv) corporation of which the debtor is a director, officer, or person in control.

#### *(1) Transfer of Debtor's Property to Defendant*

Here, from April 19, 2020 through April 19, 2021, Debtor paid Defendant \$23,700.00. Motion at 4, Dckt. 15.

#### *(2) On Debtor's Antecedent Debt*

Debtor was paying Defendant for an antecedent debt from a loan dated December 5, 2018. Motion at 4, Dckt. 15.

#### *(3) While Debtor Was Insolvent*

Debtor owed unsecured creditors \$488,912.36 at the time of the bankruptcy petition. Plaintiff-Trustee failed to provide evidence that Debtor was insolvent within the year prior to the filing of the bankruptcy petition. However, after review of Debtor's Amended Business Income and Expenses, within the previous twelve months prior to filing their petition, Debtor's average net monthly income from their business was \$3,911.54. Dckt. 24 at 25. Assuming Debtor's expenses were \$5,959.14 for the previous twelve months, as stated as their current expenses in their Schedule J, Debtor would have been insolvent for the year leading up to their filing bankruptcy.

*(4) Made to an Insider Prior to One Year of Filing*

Here, under 11 U.S.C. § 101(31), Defendant is an insider because he is the father of Debtor. Additionally, payments of \$23,700.00 were made within on year prior to filing, from April 19, 2020 to April 19, 2021 (bankruptcy filing date).

*(5) Enabling Creditor to Receive More*

This is a no asset case. As such, Creditor would not have received any payments within the one year period had the transfer not been made and the case were under Chapter 7.

All elements are satisfied to determine this is a preferential transfer. As such, pursuant to 11 U.S.C. § 547(b), Plaintiff-Trustee would have the ability to recover the payments made within the one year period.

**Defendant's Response**

On December 9, 2021, Defendant filed a response to the Motion asking the court to set the default aside. Dckt. 20. Defendant claims they never received the certified letter that was supposedly sent to him from Trustee's Attorney on October 14, 2021, the complaint. Defendant, however, did receive the notice of Default on or about November 22, 2021. Defendant then contacted Attorney Spitzer who informed Defendant of the previous letter. Defendant states giving back the \$23,700.00 would create significant financial hardship on him.

**Plaintiff-Trustee's Response**

Plaintiff-Trustee filed a response to Defendant's response on December 20, 2021. Dckt. 21. Plaintiff-Trustee states Defendant is being disingenuous. Plaintiff-Trustee states Defendant must have received the Complaint because he knew of the Status Conference which was in the same envelope of the Complaint. Additionally, Defendant's wife confirmed Defendant received the complaint. Plaintiff-Trustee requests Court enter default judgment.

**January 6, 2022 Hearing**

At the hearing, Defendant-Debtor and his Spouse appeared and addressed with the court their frustration as to the preference law as enacted by Congress and having to repay this amount to the Trustee. The court addresses that in more detail in the Minutes from the January 6, 2022 Status Conference.

The court continued the hearing to afford Plaintiff additional time to address this obligation

asserted by the Trustee and seek the assistance of counsel to understand his legal obligation and how to compromise with the Trustee on such amount.

## **FEBRUARY 10, 2022 HEARING**

The court notes no new documents or pleadings have been filed with the court since the January 6, 2022 hearing.

## **RULING**

~~\_\_\_\_\_ The court grants the default judgment in favor of Plaintiff-Trustee and against Defendant Richard Brendan Mohr, Jr. in the amount of \$23,700.00 and holds that the transfers one year prior to Debtor's filing was preferential.~~

~~The court shall issue an order substantially in the following form holding that:~~

~~\_\_\_\_\_ Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.~~

~~\_\_\_\_\_ The Motion for Entry of Default Judgment filed by Kimberly J. Husted, Chapter 7 Trustee ("Plaintiff-Trustee") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,~~

~~\_\_\_\_\_ **IT IS ORDERED** that the Motion for Entry of Default Judgment is granted for Plaintiff-Trustee and against Defendant Richard Brendan Mohr, Jr. for \$23,700.00.~~

~~\_\_\_\_\_ Attorney's fees and costs, if any, shall be requested as provided in Federal Rule of Civil Procedure 54 and Federal Rule of Bankruptcy Procedure 7054.~~

2. [21-21424-E-7](#)      **ROBERT MOHR**  
[21-2073](#)            **CAE-1**  
**HUSTED V. MOHR, JR.**

**CONTINUED STATUS CONFERENCE**  
**RE: COMPLAINT**  
**10-14-21 [\[1\]](#)**

Plaintiff's Atty: Barry H. Spitzer  
Defendant's Atty: Pro Se

Adv. Filed: 10/14/21  
Answer: 12/10/21

Nature of Action:  
Recovery of money/property - preference

Notes:  
Continued from 1/6/22 to be heard in conjunction with the continued motion for entry of default judgment.

<b>The Status Conference is <span style="color: red;">XXXXXXX</span></b>
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**FEBRUARY 10, 2022 STATUS CONFERENCE**

At the Status Conference, XXXXXXX

**Tentative Ruling:** Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

**Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(C).**

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Local Rule 9014-1(f)(2) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor), Debtor's Attorney, Chapter 7 Trustee, and Office of the United States Trustee on December 9, 2021. By the court's calculation, 28 days' notice was provided. 14 days' notice is required.

The Motion for Relief from the Automatic Stay was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 7 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion.

<b>The Motion for Relief from the Automatic Stay is <span style="color: red;">XXXXXXXXXX</span>.</b>
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Tri Counties Bank ("Movant") seeks relief from the automatic stay with respect to Mark Evan Ecenbarger's ("Debtor") real property commonly known as 18490 Gas Point Road, Cottonwood, California 96022 ("Property"). Movant has provided the Declaration of Ron Scribner to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

Movant argues Debtor executed a deed of trust in favor of movant, granting Movant a security interest in the Property. Due to lack of payments, Movant proceeded to foreclose on the property. A Trustee's sale was held and a trustee's Deed issued in favor of Movant for the property on October 15, 2021. As such, Debtor has no equitable interest in the property and the property currently belongs to Movant.

## DISCUSSION

11 U.S.C. § 362(d)(2)

Once a movant under 11 U.S.C. § 362(d)(2) establishes that a debtor or estate has no equity in property, it is the burden of the debtor or trustee to establish that the collateral at issue is necessary to an effective reorganization. 11 U.S.C. § 362(g)(2); *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs. Ltd.*, 484 U.S. 365, 375–76 (1988). Based upon the evidence submitted, the court determines that there is no equity in the Property for either Debtor or the Estate. 11 U.S.C. § 362(d)(2). Movant having foreclosed on the property prior to filing for bankruptcy, Debtor has no ownership interest in the property and as such has no equity.

### **Request for Attorneys' Fees**

In the Motion, almost as if an afterthought, Movant requests that it be allowed attorneys' fees. The Motion does not allege any contractual or statutory grounds for such fees (other than to state Movant seeks the fees "pursuant to the Security Agreement"). No dollar amount is requested for such fees. No evidence is provided of Movant having incurred any attorneys' fees or having any obligation to pay attorneys' fees. Based on the pleadings, the court would either: (1) have to award attorneys' fees based on grounds made out of whole cloth, or (2) research all of the documents and California statutes and draft for Movant grounds for attorneys' fees, and then make up a number for the amount of such fees out of whole cloth. The court is not inclined to do either.

Furthermore, a claim for attorney's fees and related nontaxable expenses must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages. Fed. R. Civ. P. 54(d)(2)(A); Fed. R. Bankr. P. 7054, 9014.

### **Request for Waiver of Fourteen-Day Stay of Enforcement**

Federal Rule of Bankruptcy Procedure 4001(a)(3) stays an order granting a motion for relief from the automatic stay for fourteen days after the order is entered, unless the court orders otherwise. Movant requests, for no particular reason, that the court grant relief from the Rule as adopted by the United States Supreme Court. With no grounds for such relief specified, the court will not grant additional relief merely stated in the prayer.

### **Continuance**

At the January 6, 2022 hearing, the Parties requested that the court continue the hearing so that they could continue to work to address matters in this case.

### **Trustee Report**

Trustee updated the court on January 7, 2022, indicating that the meeting of creditors adjourned on January 7, 2022. The Debtor and Debtor's Attorney appeared at the meeting. The meeting of creditors is continued to February 18, 2022 at 1:00 pm.

### **February 10, 2020 Continued Hearing**

At the Continued Hearing, **XXXXXXX**

The court shall issue an order substantially in the following form holding that:



Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Relief from the Automatic Stay filed by Tri Counties Bank (“Movant”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion for Relief from the Automatic Stay is  
XXXXXXXXXXXXXX.